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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-862

UNITED AIR LINES, INC.,

Appellant,

vs.

GEORGE E. MAHIN, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

SUPPLEMENTARY STATEMENT

On June 19, after appellant filed its main brief in the instant case, this Court dismissed for want of a substantial federal question, 92 S.Ct. 2461 (1972), the appeal from the Ohio Supreme Court in *United Air Lines* v. *Porterfield,* 28 Ohio St.2d 97, 276 N.E.2d 629 (1971). The Ohio Supreme Court had upheld, against Commerce Clause objections, the validity of a state excise tax on the privilege of engaging within Ohio in the air transportation of persons and property, imposed at a rate of 4% on the gross receipts from such transportation. The tax base included gross receipts from interstate flights to and from Ohio airports apportioned on the basis of mileage in and outside of Ohio. The Ohio court relied primarily on *General Motors Corp.* v. *Washington,* 377 U.S. 436 (1964), from which it concluded that this Court will uphold a "fairly apportioned gross re-

ceipts tax" so long as it is not directly on the privilege of engaging in interstate commerce.

In Part II of its main brief (pp. 44-50), United argued (as an alternative to its principal argument that no tax could be imposed on the act of loading fuel on interstate flights) that if Illinois may impose any use tax on the fuel loaded in Chicago by United, it constitutionally could do so only on that portion actually consumed in Illinois. The theory of this contention is that, although the use tax would be measured by the consumption of fuel on interstate flights, it would be reasonably apportioned to Illinois within the rationale of such cases as *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653, 661-664 (1948), and *General Motors Corp.* v. *Washington, supra.* Inasmuch as the State's brief does not discuss that argument at all, United is submitting this Supplementary Statement separate from its Reply Brief.

United Air Lines v. *Porterfield* adds a precedent closely analogous to the instant case. Both the Ohio and Illinois taxes are privilege taxes. The Ohio tax is on the receipts from interstate transportation and the Illinois tax is on the purchase price of the fuel used in interstate transportation. The validity of the Ohio tax was sustained because it was applied to the gross receipts derived from interstate flights only in proportion to the Ohio mileage of such flights to their total mileage. United's alternate theory in this case would sustain the Illinois use tax only to the extent it was imposed on fuel consumed in or over Illinois.

REPLY BRIEF FOR APPELLANT

INTRODUCTION

Appellee's brief in large part is devoted to arguments not relevant to the Commerce Clause and due process issues before this Court—whether Illinois can impose a privilege-use tax on the act of loading fuel aboard interstate and foreign flights.*

The State argues first that the sale of the aviation fuel by Shell to United actually took place in Illinois and therefore should be subject to Illinois tax. It further argues that if the sale did not occur in Illinois, it was because of arrangements artificially contrived to avoid Illinois tax on the fuel, which should nonetheless be imposed. This approach does nothing to resolve the basic issue before this Court.

In support of these themes, the State asserts that 70-80% of the fuel is refined at Wood River, Illinois (near East St. Louis); that it is unnecessary for Shell to use its northern Indiana terminal in delivering the fuel to United; and that Shell could physically deliver the fuel to United at O'Hare (and presumably Midway) airports rather than in northern Indiana as the parties have contracted.

This version of the facts is not in accord with the Stipulation (Stip. ¶ 6, App. 38) into which the State entered before trial that:

"[a]ll such fuel (aviation gasoline for piston aircraft

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* A variation of this issue is whether Illinois can deny a general statutory exemption from use tax for property temporarily stored in Illinois because it is stored there solely to facilitate United's interstate flight operations from the Chicago airports. See United's main Brief, pp. 30-32.

and kerosene for turboprop and jet aircraft) is purchased by United from Shell Oil Company, and is delivered to United, with possession, title and all risk of loss passing to United, either at Hammond, Indiana, or at East Chicago, Indiana."

It ignores the express finding of the trial court that (App. 185):

"The plaintiff [United] contends and the proof establishes* that all of this fuel is purchased from Shell Oil Company in the State of Indiana . . . ." (Footnote added.)

It ignores the Illinois Supreme Court's explicit adoption of the trial court's finding (App. 194):**

"[c]onforming to the practice which has been essentially the same since May, 1953, United purchases and takes delivery of the aviation fuel in question from Shell Oil Company at facilities of the latter located in Hammond and East Chicago, Indiana."

Attached to this Reply Brief, as Exhibit A, is a summary of the record on this factual issue.

The State's brief is selective of the facts bearing on its themes. It implies that the shipment from Wood River to northern Indiana traverses an artificially tax-motivated route, but this implication ignores the facts that Shell's private pipeline between those two points was built in 1928, and since 1938 has carried all of Shell's refinery products from Wood River to its northern Indiana terminal, of which aviation fuel is only about 30% of the products han-

* See, *e.g.*, Tr. 213, 216-217, 255-260, 302-304, 307-308, 369, App. 129, 130-131, 144-146, 157-158, 160, 182.

** Although this finding was not cross-appealed by the State to the Supreme Court of Illinois, the State again raised the issue of where the fuel was purchased in its brief and oral arguments before that Court.

dled there. (Tr. 291, 310-311, App. 154-155, 162.) It also fails to acknowledge that there is no practical way that Shell can bypass its northern Indiana terminal for these large quantities destined for the Chicago airports.*

The State's brief seeks to attach significance to the fact that "Shell admitted that it was physically possible to deliver the turbine fuel directly to O'Hare Airport." (Brief, p. 43, citing Tr. 258-260, App. 146). This overlooks the fact that such delivery by Shell would have to be effected by using the same facilities of common carriers between Shell's Indiana terminal and the Chicago airports as does United. (Tr. 280-288, App. 150-153.)

Finally, the State's brief ignores the fact that United has taken delivery of aviation fuel at Shell's northern Indiana terminal for Chicago, and for other Midwestern airports, since May, 1953, two years prior to the enactment of the Illinois Use Tax Act. (Stip. ¶ 6 & n. 7, App. 38; Tr. 309, 350-351, App. 161, 174-175; Ill. Sup. Ct. Opinion, App. 194.)

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The State's brief also fails to address itself to several of the major arguments set out in United's principal brief—i.e., Parts IB, ID and II. In particular, it is surprisingly silent as to United's alternative contention that if any of

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* The record discloses that Shell could not bypass its northern Indiana terminal except by constructing a spur pipeline to the Chicago airports at a cost, estimated during the trial in 1968, of over $2,000,000. (Tr. 287-288, App. 152-153.)

The evidence also establishes that Shell could not pump directly from Wood River to O'Hare through existing pipelines without the fuel coming to rest in northern Indiana, because the diameter of Shell's products pipeline is larger than that of the common carrier lines that intersect it at Shell's northern Indiana terminal, and because it would be a practical impossibility to coordinate Shell's pumping schedules with those of the common carriers. (Tr. 280-288, App. 150-153.)

the fuel loaded in Illinois is constitutionally taxable, it is only that portion actually consumed within Illinois. (United's main Brief, Part II, pp. 44-50.)

Even of the issues the State's brief discusses, it pays scant attention to the authority cited by United. For example, except in a footnote, it does not attempt to distinguish any of the principal authority—*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954); *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90 (1937); and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946)—cited by United in support of its contention that the act of loading the fuel onto interstate flights cannot be constitutionally taxed.

ARGUMENT

I. The State Has Attempted to Tax an Integral Aspect of Interstate Commerce, Namely the Loading of Fuel Aboard Aircraft About to Depart in Interstate Commerce, Forbidden by the Commerce Clause.

The State's brief posits two theories of the taxable incidence of the Illinois Use Tax Act as applied to United's fueling of its aircraft (Brief, p. 27):

> ". . . the taxable incident in this cause can reasonably be construed to be either storage and withdrawal [of the fuel]; or storage, withdrawal from storage and conversion to ultimate use, both measured by the amount of gas that has been stored in Illinois and withdrawn to be loaded upon United's aircraft at O'Hare and Midway."*

In support of the first theory that the tax is only on storage and withdrawal, the State quixotically argues that *any use* of the fuel in Illinois after the storage nullifies the statutory exemption, so that if the later use of the fuel is "installation [loading] or consumption," it is not such use that is the taxable event, but the earlier storage and withdrawal, which otherwise would have been exempt. (*Ibid.*)

All this ignores the opinion of the Illinois Supreme Court, which makes the *act of loading* the fuel aboard United's aircraft the incidence of the tax. (See United's main Brief, pp. 8, 20-21.) Contrary to the State's suggestion, the taxable incidence cannot be the storage and with-

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* Elsewhere, the State prefers the formula "storage and withdrawal" (e.g., Brief, p. 36), presumably because this formulation is more easily defensible than one which includes "conversion to ultimate use," which is the act of loading the fuel aboard United's aircraft.

drawal from storage, because, according to the reasoning of the Illinois Supreme Court, the critical factor is what occurs *after* the withdrawal. For example, if after withdrawal, the fuel is loaded into a truck or railroad tank car and is transported to another state for use at an airport in that state, no tax is due (App. 202); if the fuel is loaded into the tanks of a departing aircraft (or in a locomotive or a truck gas tank), the fuel so loaded is subject to Illinois use tax even though it is carried from the State in the aircraft tanks. (*Ibid.*) It follows that, under the Illinois Court's decision, the taxable event is, and can only be, the act of loading the fuel aboard United's aircraft in Illinois just prior to their interstate journeys. This act of loading also constitutes the measure of the tax.

The State further contends that "even if the taxable event is interpreted to include storage, withdrawal from storage, and installation of the fuel that ultimately propels the aircraft" (Brief, p. 27), the use tax may nevertheless be applied to United's fuel, citing *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249 (1933), and *Edelman* v. *Boeing Air Transport,* 289 U.S. 249 (1933), both distinguished in United's main brief (p. 14-15). That discussion need not be repeated here, other than to reiterate that the taxes in those cases were imposed by the state statute upon the storage and/or withdrawal from storage of gasoline, both of which events occurred "before use of the gasoline in interstate commerce begins." *Nashville C. & St. L. Ry.* v. *Wallace,* 288 U.S. at 268. In the instant case, because of the temporary storage exemption in the Illinois statute, there is no tax unless the storage and withdrawal are followed by loading the fuel into the aircraft; the tax necessarily is imposed upon the act of loading fuel onto the interstate flights, which is "an integral part of the interstate process." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 166 (1954).

Even further removed factually from the instant situation are *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 (1939), and *Pacific Tel. & Tel. Co.* v. *Gallagher,* 306 U.S. 182 (1939). In the former case, the taxpayer purchased equipment and supplies in other states which were transported to California where they were used in Southern Pacific's operations or installed as part of its rolling stock or right-of-way. In some instances, the installation was immediately after the goods came to rest in California; otherwise, they were stored until needed. Unlike the Illinois Use Tax Act, the California statute contained no exemption for temporary storage. In sustaining the application of California's use tax to these items, this Court accepted the characterization of the tax as one on "intrastate storage and use" that occurred *before* installation or use in the railroad's interstate operations. 306 U.S. at 174. The State's brief correctly alludes (p. 32) to the following conclusion of this Court (306 U.S. at 177):

> ". . . there was a taxable moment when the . . . [goods] had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment, the tax on storage and use—retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

This Court further observed that "[a] tax on property or upon a taxable event in the state, *apart from operation,* does not interfere [with interstate commerce.]" (Emphasis added.) 306 U.S. at 178. It then distinguished *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U.S. 90 (1937), on the basis that it involved a tax on the gross receipts from loading and unloading interstate cargoes, which was an impermissible burden on interstate commerce.

Yet a tax upon interstate "operation" is precisely what

Illinois would accomplish by application of its use tax to the act of loading fuel on interstate flights.* Far from sustaining the State's position in the instant case, *Southern Pacific*, particularly its distinguishing of *Puget Sound*, rejects a tax upon the loading of fuel aboard an interstate carrier—that is, use of the fuel "in the sense of consumption or operation."** 306 U.S. at 174.

What the State fails to recognize is that in each of the cases it cites—*Edelman, Nashville, Southern Pacific* and *Pacific Telephone*—the state statute imposed the tax at a point of time prior to the use of the goods in interstate commerce. This fact distinguishes those cases from *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra*, the stevedoring cases, and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946) (Import-Export Clause), in which the incidence of the tax was on an inseparable element of the interstate movement—i.e., in each case, on the act of loading that commenced the interstate movement. This fundamental difference was explicitly recognized by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 431, 432 n. 18 (1947), which, by quoting from *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 49 (1940),

* It is noteworthy that in *Southern Pacific* the goods were used or consumed in California, while in the instant case, except for *de minimis* amounts, the fuel only passes through Illinois and is consumed elsewhere.

** *Pacific Tel. & Tel. Co.* v. *Gallagher, supra*, a companion case to *Southern Pacific*, involved the same questions and is therefore likewise distinguishable from the instant case. In *Pacific Telephone*, this Court noted that the Company "exercises two rights of ownership in California—retention and installation [of materials purchased outside the State]—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system. We see no material distinction between the contentions of the [Company] and those disposed of in [the *Southern Pacific* case]." 306 U.S. at 187.

distinguished by name three of the four cases cited by the State on this very point.*

This failure to perceive that basic distinction between the two lines of cases underlies the State's argument that the fuel could be subjected to Illinois use tax because it has come to rest in Illinois before it is loaded onto United's aircraft. It is irrelevant whether or not the fuel came to rest, because the legal incidence of the tax, as construed by the Illinois Supreme Court, is not on the storage (which is not taxed under the Illinois statute apart from what follows the storage), but on the loading aboard the departing aircraft.

Apart from that argument's irrelevance, it is doubtful that the fuel has come to rest in Illinois so as to acquire a taxable situs there. On the contrary, the authorities cited by the State, all dealing with non-discriminatory property taxes, lead to the conclusion that the tax sought by Illinois would be on fuel actually moving in interstate commerce. This point is persuasively made in the brief (pp. 5-10) of the *Amici Curiae* in this case.

The standard has been enunciated by Mr. Chief Justice Hughes in *Minnesota* v. *Blasius,* 290 U.S. 1, 9-10 (1933):

> ". . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or

* ". . . Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86; *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62; *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline similarly sustained in *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249; *Edelman* v. *Boeing Air Transport,* 289 U.S. 249 . . . ." 309 U.S. at 49.

> for the purpose of safety and convenience in the course of movement. . . . *Formalities, such as the forms of billing, and mere changes in the method of transportation do not affect the continuity of the transit.* The question is always one of substance, and in each case it is necessary to consider the particular occasion or purpose of the interruption during which the tax is sought to be levied. . . . *The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if it appears 'that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation.'*" (Citations omitted and emphasis added.)

See *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95, 101-104, 107-109 (1929), and cases cited therein, holding that oil refined in Kansas, Oklahoma and Texas, shipped to Louisiana and stored there where it was "always awaiting either the arrival of a ship or the accumulation of a sufficient quantity of oil to load a ship" (279 U.S. at 101) was in a continuous movement in interstate and foreign commerce and could not therefore be subjected to an *ad valorem* property tax by Louisiana; *Hughes Bros. Co.* v. *Minnesota*, 272 U.S. 469, 474-476 (1926); compare *Joy Oil Co.* v. *State Tax Commission*, 337 U.S. 286 (1949); *Empresa Siderurgica, S.A.* v. *County of Merced*, 337 U.S. 154 (1949).*

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* See generally Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 Va. L. Rev. 1051, 1086-1093 (1960). Professor Hartman accurately summarizes the law as follows:

> "If . . . the break in the interstate excursion is temporarily caused by the necessity of the trip, is necessarily incident to the method of transit, or is for the purpose of convenience and safety in the course of movement, then the commerce clause prohibits state taxation. Under this approach to the question of taxability, such formalities as the form of billing and changes in the method of transportation do not affect the continuity of the interstate operation so as to afford a taxable toe-hold to the state." *Id.* at 1089. (Citations omitted.)

The record demonstrates that the fuel purchased by United in Indiana is on a continuous interstate journey through Illinois within the rule delineated in *Blasius*. The fuel is purchased by United for its interstate and foreign flight operations, and it is transported by common carrier from Indiana to storage facilities at O'Hare and Midway airports where it is held for a minimum of 2 days (during which period the fuel is settled and filtered to eliminate impurities arising from the pipeline shipment) to a maximum of 12 days, averaging 2 to 6½ days. (Stip. ¶¶ 6, 7, App. 38.) From the storage facilities, the fuel is directly piped or trucked to the waiting aircraft. The fuel remains in Illinois only so long as necessary for certain purification processes, and from there it is pumped into the tanks of United's aircraft, almost always immediately prior to departure time. (Stip. ¶ 7, App. 36.) Of this fuel loaded in the aircraft tanks, almost all of it is carried from Illinois and is consumed over other states. In fact, depending on the type of aircraft, at least 35 to 60% of the fuel loaded in Chicago is burned after the aircraft has landed in another state and is continuing on the next leg of its interstate journey. Of the 250,000,000 gallons passing through Illinois each year, loaded on some 85,000 departing flights, only small amounts are burned in Illinois on about 3.7% of those departures. (See United's main Brief, pp. 11-16, 46 n.)

Not only is the flow of the fuel through Illinois continuous except for exigencies of its transportation, but the Illinois Supreme Court itself concluded that United *intended* to store the fuel in Illinois *only* to facilitate its interstate operations.*

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* "United does not store [the fuel] in Illinois with any intention that the fuel will be used solely outside this State. Rather, *the fuel is stored here only to facilitate United's* [*interstate*] *operations from the O'Hare and Midway airports within the State.*" (Emphasis added.) (App. 202.)

As stated in *Independent Warehouses* v. *Scheele,* 331 U.S. 70, 80 (1947):

> "A characteristic feature of those cases in which the state has been allowed to tax property which has come to rest after an interstate journey is that at the time the tax is laid *it cannot be determined what the ultimate destination or use of the property may be.*" (Emphasis added.)

In contrast, in the instant case the exclusive consumption of the fuel by interstate flights (almost entirely outside Illinois) is known from the time of purchase from Shell in Indiana. See also *Interstate Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 687-689 (1947). This fact also distinguishes the situation from that of *Nashville C. & St. L. Ry.* v. *Wallace, supra,* 288 U.S. at 266, and *Edelman* v. *Boeing Air Transport, supra,* 289 U.S. at 251, where the stored fuel was interchangeably used in varying amounts for both local and interstate movements.

Therefore, it is apparent from the facts of the case that no taxable situs has been acquired in Illinois. On the contrary, its presence in Illinois, averaging from 2 to 6½ days, was entirely during an interstate movement which under the decisions of this Court is immune from State taxation.

This immunity is of crucial importance where the tax is a use tax imposed on all the fuel passing through United's storage facilities at the Chicago airports during a year, in contrast to a property tax which would affect only the quantity of fuel stored in Illinois on the assessment date.

II. Application of the Illinois Use Tax to United's Fuel Loaded in Chicago Would Subject That Fuel to Multiple Taxation in Violation of the Commerce Clause.

Part IB of the State's brief is a melange of conjecture and hypothetical issues. United has never contended that

the Illinois Use Tax Act is *per se* unconstitutional, but only that it could not be constitutionally applied to the act of loading fuel into aircraft about to depart on interstate or foreign flights. Thus, the State's reference to *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), is no more apposite to the issues of this case than the authority cited by the State in Part IA of its brief, all of which involved imposition of a state tax on goods after or before their movement or use in interstate commerce. *Henneford* merely held that a use tax could be applied to materials that come to rest in a State after having moved in interstate commerce. The incidence of the tax Illinois seeks to impose is not on property that has come to rest within the State, but is rather on fuel which is veritably " 'taking off' in appellant['s] carrier into commerce; in reality the tax is, therefore, on the exit of the gas from the State." *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 167 (1954).

Another group of arguments raised by the State is that there is no multiple taxation involved here because (i) there is nothing in the record that Shell Oil actually pays the Indiana gross income tax on its sales of fuel to United; (ii) that even if Shell pays the tax it is doing so as a volunteer because the regulations under the Indiana gross income tax exempt sales for delivery outside that State; (iii) but even if Shell is properly paying the tax on these sales, United *may* be entitled to a credit against its Illinois tax liability for the Indiana tax that is paid on the purchase of the fuel.

The first contention is no more than a quibble over the meaning of the parties' stipulation that "since May 1, 1953, Shell Oil Company has collected from United the Indiana Gross Income Tax measured by the purchase price of [the fuel] paid by United to Shell Oil Company." (Stip. ¶ 13, App. 41. See Tr. 154-156, 407, App. 102-104, 183.) No one

heretofore has raised the improbable hypothesis that Shell does not pay its gross income tax to Indiana.*

The State's assertion that Shell may be unnecessarily paying the Indiana gross income tax on these sales is unsound. All elements of the sales from Shell to United occur in Indiana—acceptance of the order, passage of title and risk of loss, delivery to the purchaser, and payment—and therefore, it is an Indiana sale subject to the Indiana gross income tax. See *International Harvester Co.* v. *Department of Treasury,* 322 U.S. 340 (1944); *Department of Treasury* v. *Wood Preserving Corp.,* 313 U.S. 62, 66 (1941), distinguishing *Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938). The Indiana tax regulation cited in the State's brief deals with sales in which delivery occurs outside of Indiana to an out-of-state purchaser, the receipts from which, under decisions of this Court such as *Adams Manufacturing Co.* v. *Storen, supra,* may not be subjected to an unapportioned gross income tax. But, as the parties stipulated, and as the trial court and Illinois Supreme Court concluded, what is involved in the instant case is a sale and delivery in Indiana subject to the Indiana gross income tax.**

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* The State concedes, however, that "[t]he record clearly establishes that United by contractual obligation pays to Shell Oil Company an annual dollar amount that equals what Shell would pay to the State of Indiana if the purchase price of the sale of fuel to United was included in the gross receipts measuring the Indiana gross income tax." (Brief, p. 38.)

** It is significant that the Illinois Department of Revenue audited Shell for some of the years in question to determine whether it owed any Illinois retailers' occupation tax or use tax because Shell sold the fuel in question to United in Illinois rather than Indiana. The audit did not lead to any assessment of tax on this theory. (Tr. 431, 436-437, App. 184-185.) It is also relevant that United holds an Indiana wholesale fuel distributor's license because the laws of that state require such a license as a prerequisite to taking delivery of large quantities of fuel in Indiana. (UA Ex. 32, Tr. 365, App. 180; Tr. 364, App. 179-180.)

The State's contention that there is no multiple taxation in the instant case because United may be entitled to a credit in Illinois for the Indiana tax paid is irrelevant to the issues before this Court.* Actually, the State's brief (pp. 39-41), contradictorily argues that there is no multiple tax on United because it may be entitled in Illinois to a credit for the Indiana tax, while it concurrently contends that United is not entitled to any such credit except for a previously paid *sale or use* tax.

To start with fundamentals, a credit against the Illinois 4% use tax for a ½% Indiana gross income tax does not prevent multiple taxation of this fuel. It would do so only under the fortuitous circumstance that the Indiana rate equalled or exceeded the Illinois rate, which is not now and never has been the situation.**

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* This Court should be aware that United asserted from the outset of this case that any Illinois use tax imposed on its loading of the fuel at the Chicago airports should be reduced by the amount of Indiana gross income tax that was imposed on the purchase of the same fuel. Neither the trial court nor the Illinois Supreme Court decided that issue. Before the Illinois courts the State vigorously claimed that United is not entitled to any credit because, among other things, the Illinois credit is available only for sales and use taxes paid to another jurisdiction, in contrast to a tax such as the Indiana gross income tax involved in the present case. The State has reasserted the latter objection in its brief to this Court (p. 41).

** Except by chance, a credit does not effect a fair apportionment of taxes between the states involved according to the activities in each of those states. The amount of the credit depends solely on the relationship of its tax rates to those of the first state that has imposed a tax on the transaction. This is to be contrasted with true apportionment, such as would exist under the alternative argument in United's main brief (pp. 44-50), under which Illinois would be permitted to impose use tax only on the fuel actually burned in that state. To the same effect is the apportionment of receipts based on mileage in *United Air Lines* v. *Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971), appeal dismissed, 92 S.Ct. 2461 (1972) (discussed at pp. 1-2, *supra* and pp. 18-19, *infra*).

The fact is that, if Illinois is permitted to impose the use tax on the fuel, there will be double taxation. The "operating incidence," *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965), of both the Indiana gross income tax and the Illinois use tax is the same. They are both privilege taxes measured by gross receipts—the selling price of the taxed property. Therefore, if the Illinois use tax is applied to all fuel loaded in Illinois, United will be subject to direct multiple state taxation which has been consistently prohibited by this Court. (See discussion at pp. 33-36 of United's main Brief.)

In addition to the actual multiple taxation of this fuel by Indiana and Illinois, there is an additional potential multiple tax burden—which would be ineligible for any Illinois tax credit. At present United pays Illinois use tax on fuel consumed on its intrastate flights between Chicago and Moline, which United concedes can be imposed by a state without running afoul of the prohibitions of *Helson and Randolph* v. *Kentucky*, 279 U.S. 245 (1929).

The record shows that United serves 49 similar intrastate segments daily in other states by flights departing from Chicago. (See Exhibit B to this Brief.) As the volume of fuel loaded at Chicago indicates, and the brief time on the ground at these smaller airports confirms (United Exhibit 6), these flights are not refueled at each small intermediate point such as Cedar Rapids, Saginaw, Columbus, or the like. California, Colorado, Indiana, Iowa, Michigan, Nebraska, New York and Ohio, in which these flights operate, can exercise the same intrastate taxing power as does Illinois. This means that United's fuel loaded at Chicago (all of which Illinois seeks to tax) could be taxed again as it is consumed on intrastate segments of almost 17,000 flights annually. The potential multiple tax burden is real and substantial.

This prospect seems more likely since this Court, 92 S.Ct. 2461 (1972), has refused jurisdiction of the appeal in *United*

Air Lines v. *Porterfield*, 28 Ohio St.2d 97, 276 N.E.2d 629 (1971), which held that the Commerce Clause did not invalidate a state excise tax on the privilege of engaging within Ohio in air transportation of persons and property, imposed at a rate of 4% on gross receipts derived from such transportation, where the receipts from interstate flights were apportioned on the basis of mileage in and outside of Ohio. It would seem that if gross receipts from interstate air transportation may be apportioned according to mileage in and outside of a state, so also fuel consumed on such flights, if taxable at all, constitutionally may be subject to use tax only on a fairly apportioned basis.

This Court has recognized that the availability of an interstate tax credit is not relevant in determining the validity of a state tax under the Commerce Clause. In both *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 583-585 (1937) and *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 172, 174-175 (1939), this Court found that a use tax could be imposed on goods that were at rest in the state after an interstate movement, and in the latter case before the goods were incorporated in an interstate railway system. In the former case, a credit existed for the other state taxes previously paid; in the latter case, no such credit existed. In both cases, this Court indicated that the existence of the credit was not determinative.

In those cases, this Court correctly saw that an interstate tax credit does not affect constitutionality under the Commerce Clause because it does not affect the existence of the burden on the commerce, and as this Court has said in *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 609 (1951):

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was *exclusively* interstate

in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. . . ."*

This principle is unequivocally applicable here. Under the authority of *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), and related cases, a state is forbidden to tax an integral aspect of interstate commerce, such as the loading of fuel aboard aircraft prior to their departure in interstate commerce. Therefore, even if the impact of such a tax were *reduced* by a credit for taxes properly paid to another jurisdiction, the vice of the Illinois tax remains —a direct and unconstitutional imposition upon an integral aspect of interstate commerce.**

III. The Sales of Fuel in the Instant Case Were Not Made in Illinois, but Even if They Were Illinois Sales (which Constitutionally Could be Subject to an Illinois Sales Tax), It Does Not Follow that Illinois can Impose a Use Tax on the Loading of the Fuel.

The State's final contention is, in essence, that United's purchases of fuel from Shell in Indiana actually are Illinois sales, which Illinois constitutionally could tax even though intended for consumption by interstate flights, and therefore it may also impose use tax upon the loading of that fuel in Illinois. This is factually and legally unsound.

This argument—which was not made below—ignores the explicit findings of both the Illinois trial and Supreme

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* Similarly, as Mr. Justice Frankfurter stated for the Court in *Freeman* v. *Hewit*, 329 U.S. 249, 256 (1946):

> "[T]here is [no] warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct interference with interstate commerce."

** The Illinois use-privilege tax, as applied to United in the present case, also amounts to a tax upon the *privilege* of engaging in an indispensable aspect of interstate commerce forbidden by *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951); see *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959).

Courts that all of the fuel was sold and delivered by Shell to United in Indiana. (See pp. 3-4, *supra.*) The Illinois Supreme Court's holding that the use tax was due on all the fuel loaded at the Chicago airports was *not* based on a finding that United purchased the fuel in Illinois. It is therefore improper for the appellees to ask this Court to make a finding of fact contrary to that made below.

In any event, this argument is fallacious. In contending that Illinois may tax the Indiana sales from Shell to United, the State relies primarily on *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 58 (1940) and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 345, 348 (1944), which respectively involved the imposition of the New York City sales tax and the Indiana gross income tax on sales that involved *delivery of the goods to the customer in the taxing jurisdiction.* Thus, these cases actually support the opposite position than that for which the State's brief has invoked it. Since orders for United's fuel were placed with Shell in Indiana (Tr. 302-304, App. 157-158), and transfer of possession, delivery and payment for United's fuel all occurred in Indiana (*e.g.*, Tr. 254-259, 302-304, 369, App. 143-146, 157-158, 182), it is that State which has the power to tax the sales transaction, not Illinois.

Indeed, the facts of the present case are similar to those in *McLeod* v. *Dilworth Co.*, 322 U.S. 327 (1944), which invalidated an Arkansas sales tax on goods ordered from a Tennessee corporation, with delivery to a carrier in Tennessee at which time title passed to the buyer, and payment for the goods in Tennessee. As this Court described the transactions, "sales [were] made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." 322 U.S. at 328.*

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* Nor are the other cases cited by the State, such as *Eastern Air Transport* v. *Tax Commission*, 285 U.S. 147 (1932), of any aid to its position. They merely stand for the unremarkable proposition that a state may tax a sale consummated within its jurisdiction. They have no application to the instant situation, where the State asserts the power to tax a sale which occurs in another state. So, also, in

More recently, in *American Oil* v. *Neill*, 380 U.S. 451 (1965), this Court invalidated, on due process grounds, an Idaho motor fuel license tax upon a seller doing business in that state for sales consummated outside Idaho. This Court summarized the facts as follows (380 U.S. at 458):

> "Each and every phase of the transaction had its locus outside of Idaho [the taxing State]: invitations for bids were issued by the Government in Seattle, Washington; Utah Oil [the seller] submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f.o.b. Salt Lake City; Utah Oil delivered the gasoline to Salt Lake City, and it was there that title passed [to the buyer]."

This Court rejected, 380 U.S. at 457-459, Idaho's contention that it could impose tax on these sales because the seller (i) sold the gasoline with knowledge that it would be imported into and used within Idaho, and (ii) was authorized to do business in Idaho as a distributor of motor fuels.*

Department of Treasury v. *Ingram-Richardson Mfg. Co.*, 313 U.S. 252 (1941), this Court sustained Indiana's taxation of a corporation having a factory in that state at which it manufactured enamel and applied it to metal articles transported from other states, on the basis that "the entire service was in aid of the enameling business conducted within the State. The transportation of the metal parts to and from Indiana were but incident to that intrastate business. . . ." 313 U.S. at 255.

* In rejecting the first contention, this Court stated, *id.* at 457-458:

> "The mere fact that Utah Oil knew that the gasoline was to be imported into Idaho merits little discussion. More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing State, despite the fact

But even if these purchases were made in Illinois so that Illinois could impose a sales tax on them, the State's brief cites no authority—and United believes there is none—to support its argument that this consequently permits Illinois to impose a use tax on the loading of fuel into aircraft about to depart on interstate or foreign flights.*

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that the vendor knew that the goods were destined for use in that State. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (use tax); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (gross receipts tax); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (sales tax).

"These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co.* v. *Maryland*, *supra*, at 344-345."

* The converse of this proposition has been forcefully disposed of in *McLeod* v. *Dilworth Co.*, 309 U.S. 327, 330-331 (1944):

". . . A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States."

CONCLUSION

Surfacing repeatedly in the State's brief is the innuendo that United is engaged in a tax avoidance scheme designed to deprive Illinois of its right to tax every drop of fuel that United loads on its interstate flights in Chicago.*

This view overlooks the fact that United pays for the services provided by the City of Chicago and the State of Illinois by fully compensatory fees for the construction, support and maintenance of the Chicago airports, and for more intangible benefits received from Illinois and its subdivisions by Illinois income, use and property taxes.

The State also finds it difficult to focus on the reality that the fuel's presence in Illinois is transitory: its interstate journey commences in Indiana, and rests in Illinois only so long as the exigencies of its own transportation and the needs of United's interstate operations require. Essentially all of it is then carried from the State in the tanks of United's aircraft and is burned in other States, 35 to 60% of it after the flight has landed in another State and is on another leg of its interstate journey.

It is these facts, rather than a putative tax avoidance scheme prophetically concocted two years before the Illinois Use Tax Act was enacted, against which the real issue of this case is framed.

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* But as Judge Learned Hand once wrote:

"Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." *Commissioner* v. *Newman*, 159 F.2d 848, 850-851 (2nd Cir. 1947) (dissenting opinion), quoted with approval in *Atlantic Coast Line* v. *Phillips*, 332 U.S. 168, 173 (1947).

That issue is simply whether Illinois can exact additional revenue from United by imposition of a privilege-use tax upon the act of loading fuel aboard its aircraft immediately prior to their interstate journeys which consume the fuel. It is this particular imposition by the State upon an integral aspect of interstate commerce which United contends is constitutionally impermissible.* *E.g., Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 166-169 (1954).

For the reasons stated herein and in its main brief, United requests this Court to reverse the judgment of the Supreme Court of Illinois and to prohibit the imposition of the Illinois use tax on United's fuel which is loaded aboard its aircraft in Chicago for departure in interstate and foreign flights, or, in the alternative, if this case is considered to fall within the area where the apportionment rule properly applies, that Illinois be permitted to tax only that portion of the fuel which is consumed in or over Illinois on United's flights departing from Illinois.

Respectfully submitted,

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* Alternatively, United contends that Illinois may not constitutionally deny United the benefit of a statutory exemption for property temporarily stored in Illinois because, and only because, the temporary storage is to facilitate United's interstate operations from the Chicago airports. See United's main Brief, pp. 30-32.

That issue is simply whether Illinois can exact additional revenue from United by imposition of a privilege-use tax upon the act of loading fuel aboard its aircraft immediately prior to their interstate journeys which comprise the flight. It is this particular imposition by the State upon an integral aspect of interstate commerce which United contends is constitutionally impermissible. See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166-167 (1954).

For the reasons stated herein and in its main brief United requests this Court to reverse the judgment of the Supreme Court of Illinois and to prohibit the imposition of the Illinois use tax on United's fuel which is loaded aboard its aircraft in Chicago for consumption in interstate and foreign flight, or, in the alternative, if the case is considered to fall within the area where the [illegible] apportionment rule properly applies, that Illinois be permitted to tax only that portion of the fuel which is consumed in or over Illinois on United's flights departing from Illinois.*

Respectfully submitted,

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* Accordingly, United contends that Illinois must, [illegible] only Illinois that [illegible] consumption, [illegible] Illinois [illegible], [illegible] only [illegible] [illegible] the Chicago airport. See United's main brief, pp. [illegible].

EXHIBIT A

PROCEDURES BY WHICH UNITED AIR LINES PURCHASES AVIATION FUEL FROM SHELL OIL COMPANY IN INDIANA

All of the fuel loaded aboard United's interstate and foreign flights departing from O'Hare and Midway airports in Chicago is purchased from Shell Oil Company at its terminal at East Chicago and Hammond, Indiana, at which point title, possession and risk of loss to the fuel pass to United. Shell has no property or interest in, nor do its employees or agents have anything to do with, that fuel after delivery at its northern Indiana Terminal.*

That the risk of loss shifts to United at Shell's Terminal is underscored by the procedures employed by Shell and West Shore Pipe Line Company in billing United for fuel deliveries and transportation charges. Shell bills United at the contract price for the amount of fuel which it delivers to the West Shore receiving meters at the Indiana terminals of the West Shore line. When the fuel is delivered to United at Des Plaines, Illinois, near O'Hare Airport, it is metered from the West Shore line, which usually show about 150 to 175 barrels less than the meter reading at the Indiana end of the line. (The shortage is caused by the intermixture of adjoining slugs of fuel during pipeline movement.) West Shore issues United a credit for the value of the shortage. (Tr. 328-329, 364, App. 165-166, 179.)

The detailed evidence relating to the sale and delivery of the turbine fuel and aviation gasoline by Shell to United, and its shipment by United to Midway and O'Hare airports can be summarized in tabular form.

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* This was confirmed by the Department of Revenue's audit of Shell for the Illinois retailers' occupation (sales) tax through the calendar year 1965. (Tr. 431, 436-437, App. 184-185.)

	O'Hare		Midway	
	Turbine Fuel	Aviation Gas	Turbine Fuel	Aviation Gas
(1) All sales and deliveries pursuant to fuel contracts signed in New York. (UA Exs. 28-31, Tr. 357)	Yes	Yes	Yes	Yes
(2) Fuel orders to Shell placed by (UA Exs. 33, 38, Tr. 368, 406; App. 182; Tr. 296-297, 350-351, 367; App. 156-157, 174, 181)	Lockheed Air Terminal, Inc., as Agent for United		Butler Aviation Company, as Agent for United	
(3) Form of fuel order (Tr. 302-303, 350-351; App. 157-158, 174)	Written with oral amendments	Oral	Oral	Oral
(4) Frequency of orders (Tr. 297, 302; App. 156-157)	10th of preceding month for three shipments in next month; irregular oral amendments	Irregular	Irregular	Irregular
(5) Orders accepted by Shell at (Tr. 302-303; App. 157-158)	Shell's East Chicago Terminal Office			
(6) Frequency of shipment (Tr. 297, 302; App. 156-157)	1st, 10th and 20th of each month	Irregular	Irregular but frequent	
(7) Title passes to United (UA Exs. 28-31, Tr. 357)	At receiving meters of West Shore Pipe Line Co., Hammond, Indiana		At Shell's truck terminal East Chicago, Indiana	
(8) Place of "delivery" under contract* (Tr. 254-259, 303-304; App. 143-146, 158)	*	*	*	*
(9) Risk of loss passes under contract (UA Exs. 28-31, Tr. 357)	*	*	*	*
(10) Shell's insurance on product ceases (Tr. 218, 304; App. 132, 158)	*	*	*	*
(11) United's insurance on product commenced (Tr. 327-328, 332; App. 165, 168)	*	*	*	*
(12) Shell's agents' or employees' services incident to fuel after point of delivery in Indiana (Tr. 214, 219, 222, 245, 254-258, 258, 366-367; App. 129-130, 132, 134, 141-145, 175, 180-181)	None	None	None	None

* United holds an Indiana Motor Fuel Distributor's License because it receives large quantities of fuel in Indiana (UA Ex. 32, Tr. 365, App. 180; Tr. 364, App. 179-180).

	O'Hare		Midway	
	Turbine Fuel	Aviation Gas	Turbine Fuel	Aviation Gas
(13) United's common carrier from Indiana to airport (UA Ex. 37, Tr. 396; Tr. 258, 303; App. 145, 157-158)	West Shore Pipe Line Company		Rogers Cartage Company	
(14) Orders to carrier placed by (Tr. 350-351; App. 174-176)	Lockheed	Lockheed	Butler	Butler
(15) Responsibility to United for loss or shortage on fuel during shipment (UA Ex. 37, Tr. 396; Tr. 328; App. 165-166)	West Shore under ICC tariff		Rogers Cartage per paragraph 5 of its contract with United	
(16) Fuel identified as United's during shipment (Tr. 330; App. 166-167)	Yes	Yes	Yes	Yes
(17) Invoices from—to (Tr. 307, 369; App. 160, 182)	Shell's Indianapolis, Indiana office to United's Des Plaines, Illinois office			
(18) Method and place of payment (Tr. 369; App. 182)	By check directly to Shell's Indianapolis office			
(19) Invoices from carriers (Tr. 364; App. 179)	Directly by West Shore to United		By Rogers Cartage directly to United	
(20) Shell's ownership of or management participation in United's fueling agents (Tr. 308, 401; App. 161, 182-183)	Lockheed—none		Butler—none	
(21) Shell's ownership interest in United's common carriers (Tr. 216-218, 254, 304-305; App. 131-132, 144, 159)	West Shore—20% with 9 other shareholders; elects one of 10 directors; no officers or management responsibility		Rogers Cartage—none	
(22) Shell's participation in United's common carriers' management (*ibid*)	West Shore—none		Rogers Cartage—none	

EXHIBIT B

ANALYSIS OF INTRASTATE FLIGHT SEGMENTS OF AIRCRAFT DEPARTING FROM CHICAGO

(United Exhibit 6)*

United Ex. 6 Page No.	Flight Number	Intrastate Segment	Potential Taxing State
4	743	Cedar Rapids-Des Moines	Iowa
		Omaha-Lincoln	Nebraska
5	857	Omaha-Lincoln	"
		Denver-Grand Junction	Colorado
6	483	Sacramento-San Francisco	California
6	419	Los Angeles-San Diego	"
6	103	Los Angeles-San Diego	"
8	109	Los Angeles-San Diego	"
9	273	Sacramento-San Francisco	"
12	235	Sacramento-San Francisco	"
12	779	Cedar Rapids-Des Moines	Iowa
15	117	Los Angeles-San Diego	California
20	316	Dayton-Columbus	Ohio
21	732	South Bend-Fort Wayne	Indiana
21	700	Saginaw-Flint	Michigan
21	366	Buffalo-Rochester	New York
21	758	Muskegon-Lansing	Michigan
21	338	Akron-Youngstown	Ohio
22	714	Saginaw-Flint	Michigan
		Flint-Detroit	"
22	364	Buffalo-Rochester	New York
23	708	Grand Rapids-Detroit	Michigan
23	756	South Bend-Fort Wayne	Indiana
23	604	Muskegon-Lansing	Michigan
		Lansing-Detroit	"
25	246	South Bend-Fort Wayne	Indiana
25	334	Buffalo-Rochester	New York
25	276	Akron-Youngstown	Ohio
26	850	Dayton-Columbus	"

United Ex. 6 Page No.	Flight Number	Intrastate Segment	Potential Taxing State
26	808	Saginaw-Flint	Michigan
26	660	Grand Rapids-Lansing	"
27	790	Toledo-Cleveland	Ohio
27	746	South Bend-Fort Wayne	Indiana
27	672	Saginaw-Flint	Michigan
		Flint-Detroit	"
29	408	Columbus-Dayton	Ohio
29	610	Akron-Youngstown	"
29	608	South Bend-Fort Wayne	Indiana
29	214	Buffalo-Rochester	New York
30	728	Saginaw-Detroit	Michigan
30	630	Flint-Detroit	"
31	722	Muskegon-Saginaw	"
		Saginaw-Flint	"
		Flint-Detroit	"
32	784	Grand Rapids-Lansing	"
		Lansing-Detroit	"
33	370	Buffalo-Rochester	New York
51	*9999	Los Angeles-San Francisco	California

* Illinois intrastate flights for which United pays fuel tax not included.